



STATE OF INDIANA
ALCOHOL AND TOBACCO COMMISSION

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Speedway SuperAmerica, LLC)
d/b/a Speedway #6636)
1110 E. Ireland Road) Permit #DL71-22428
South Bend, IN 46614)

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

I.

BACKGROUND OF THE CASE

Speedway SuperAmerica LLC d/b/a Speedway #6636, 1110 E. Ireland Road, South Bend, Indiana 46614 ("Permittee") is the holder of an Alcohol and Tobacco Commission permit type 104, permit #DL71-22428. The Permittee is charged with the following violation occurring on November 9, 2009:

Beer Dealer-Cold Beer Sales Indiana Code 7.1-5-10-11

The hearing on the merits was conducted before Hearing Judge E. Edward Dunsmore on July 1, 2010. The Alcohol and Tobacco Commission ("Commission") was represented by the Prosecutor, Jennifer D. Drewry. The Permittee appeared by Matthew E. Morgan, attorney at law. Witnesses were sworn, evidence was heard, the parties presented final arguments and the matter was taken under advisement. Hearing Judge E. Edward Dunsmore, having reviewed the tape-recorded transcript of the hearing, the evidence submitted to the Commission at the hearing and the contents of the entire file, now tenders his Proposed Findings of Fact and Conclusions of Law for recommendation to members of the Commission.

II.

EVIDENCE SUBMITTED BEFORE THE COMMISSION

The following exhibits were introduced by the Prosecutor against the Permittee in this cause:

1. The contents of the entire Commission file. ("ATC file")
2. Indiana State Excise Police Citation Report, regarding an incident occurring on November 9, 2009, at Speedway # 6636, South Bend, IN. ("Exhibit A", pages 1-4)
3. Copy of Indiana Excise Police Report of Permit Visit and Evaluation issued to Speedway SuperAmerica LLC d/b/a Speedway #6636, for Beer Dealer-Cold Beer Sales in violation of IC 7.1-5-10-11, regarding an incident occurring on November 9, 2009, at the Speedway #6636 in South Bend, IN. ("Exhibit A", page 5)
4. One copy of a photograph of a display of beer cans on a plastic rack attached by suction to the outer side of a cooler door as illustrative of the display for which the Permittee was cited in this case. ("Exhibit B")

The following exhibits were introduced by the Permittee on behalf of the Permittee in this cause:

1. Email correspondence between Speedway SuperAmerica LLC paralegal, Jennifer Blessing, and Major Robin Poindexter, Indiana State Excise Police. ("Exhibit 1")
2. Thomas Applegate affidavit, consisting of two typewritten affidavit pages and two pages of photographs. ("Exhibit 2")

The following individuals testified on behalf of the Prosecutor against the Permittee in this cause:

1. Indiana Excise Police Officer Harrison Rich
2. Indiana Excise Police Major Robin Poindexter

The following individuals testified on behalf of the Permittee in this cause:

1. Thomas Applegate, district manager for Speedway SuperAmerica LLC, including Speedway #6636

III.
FINDINGS OF FACT

1. The Permittee, Speedway SuperAmerica LLC, d/b/a Speedway # 6636, 1110 E. Ireland Road, South Bend, Indiana, Indiana 46614, is the holder of a type 104 permit, permit #DL71-22428. (ATC File)
2. Stephen C. Smith ("Smith") is the manager of Speedway # 6636. (Permit Violation Hearing, ATC File)
3. On Monday, November 9, 2009, at approximately 1:58 pm, Indiana State Excise Police Officer ("ISEP") Harrison Rich conducted a complaint investigation of alleged cold beer sales at the business known as Speedway SurperAmerica LLC, d/b/a Speedway #6636 ("Permit Location") located at 1110 E. Ireland Road, South Bend, Indiana 46614. (Permit Violation Hearing; ATC File)
4. On the above date and time ISEP Officer Rich entered the Permit Location and approached the cooler area and observed five 24 oz. cans of various beer brands being displayed on a plastic rack that was attached by suction to the outside of the cooler doors. (Permit Violation Hearing; ATC File)
5. ISEP Officer Rich picked up these displayed beers and observed and felt that they were slightly frosted and cold. There were two sets of such plastic racks, each containing five 24 oz. beers. (Permit Violation Hearing; ATC File)
6. ISEP Officer Rich then approached the service counter and asked to speak to the manager. Manager Smith introduced himself to Officer Rich as the manager of the Permit Location. (Permit Violation Hearing; ATC File)
7. Officer Rich identified himself, verbally and by display of badge, and informed manager Smith of the complaint received of cold beer sales and escorted Smith to the beer attached to the cooler doors. Officer Rich advised Smith that the beers were being cooled indirectly by their placement on the racks attached to the cooler doors. (ATC File; Permit Violation Hearing)
8. Upon receiving the above advice from Officer Rich, Smith stated that he thought that by attaching the beer to the cooler doors that they would get cold; however, the corporate office had issued instructions to place them there. (ATC File; Permit Violation Hearing)
9. Officer Rich advised Smith that since the beers were being displayed for sale and were being cooled that it was unlawful for the beers to remain on the cooler doors. Mr. Smith then removed the racks and beers from the cooler doors. (Permit Violation Hearing)
10. Officer Rich completed a notice of violation form for Beer Dealer-Cold Beer Sales (IC 7.1-5-10-11). The violation was explained to Smith and he signed and received a copy of the violation form. Officer Rich then left the Permit Location. (Permit Violation Hearing; ATC File).
11. The beers on the cooler rack were cooler to the touch than those beers in the Permit Location not attached to the cooler doors. (Permit Violation Hearing; ATC File)

12. Officer Rich judged the beers attached to the cooler door to be cool or cold by comparing by touch those on the cooler door to those not attached to the cooler door. He did not touch any nonalcoholic cans located inside the cooler itself. (Permit Violation Hearing)
13. ISEP Major Poindexter testified that by statute only package liquor stores may display and/ or sell beer that is cold or cool and that package liquor stores are strictly limited by statute on the commodities which they can sell, while convenience and grocery stores may not sell or display cold or cool beer, but may sell most commodities. Major Poindexter testified that the ISEP enforces these state statutes as policy, believing that such enforcement reflects the industry standards as reflected in the state statutes. (Permit Violation Hearing)
14. Major Poindexter testified that ISEP policy on enforcement of IC 7.1-5-10-11 is to instruct ISEP officers to judge the temperature of the alcoholic beverages for sale by touch. (Permit Violation Hearing)
15. Major Poindexter testified to and acknowledged email correspondence between Speedway SuperAmerica LLC paralegal Jennifer Blessing and him, dated November 13, 2009 and November 23, 2009 (Exhibit1). This correspondence shows that the ISEP had provided an opinion that cooler door suction rack displays and sales violated IC 7.1-5-10-11. (Permit Violation Hearing)
16. Major Poindexter testified that it would be permissible for the Permittee to sell to a customer warm beer, ice and a cooler to enable the customer to cool his/her beer. (Permit Violation Hearing)
17. Thomas Applegate ("Applegate") is the District Manager for Speedway SuperAmerica LLC, which includes Speedway # 6636, the Permit Location. He is familiar with IC 7.1-5-10-11. (Permit Violation Hearing)
18. In 2008, the corporate Permittee decided to place suction cup displays holding beer cans on the outside of beverage-cooler doors throughout its Indiana stores for display and marketing purposes in order to increase beer sales by making customers aware that a particular store sold beer. (Permit Violation Hearing)
19. On November 9, ISEP Officer Harrison Rich issued a citation to Speedway #6636 for violation of IC 7.1-5-10-11 based upon the suction cup beer display. (Permit Violation Hearing)
20. In anticipation of the upcoming Commission permit violation hearing, Applegate conducted a temperature test at Speedway # 6636 store on June 15 and June 16, 2010, to determine whether beer on display outside the cooler door was colder than beer on the shelves. (Permit Violation Hearing)
21. The results of the test were as follows; a) the ambient air store temperature was 67 degrees, b) the beer in cans from the shelf was 60 degrees, c) the beer in cans from the suction cup display was 59 degrees. (Permit Violation Hearing)
22. Any finding of fact may be considered a conclusion of law if the context so warrants.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over these proceedings and over this permittee. Indiana Code 7.1-3-19-1; Indiana Code &.1-3-19-2; Indiana Code 7.1-3-23-2
2. The definition of a permittee includes an agent, a servant, or other person acting on behalf of a permittee, whenever a permittee is prohibited from doing an act under this title. Indiana Code 7.1-1-3-30(b)
3. Stephen C. Smith (manager) was an agent or other persons acting on behalf of a permittee, namely, Speedway SuperAmerica LLC, d/b/a Speedway #6636. Indiana Code 7.1-1-3-30(b)

4. A permittee shall have no property right in a wholesaler's, retailer's, or dealer's permit of any type. Indiana Code 7.1-3-1-2
5. The Commission has...."the power to regulate or prohibit a practice,...by permittees, which in the judgment of the commission is inimical to, or a violation of a provision of this title or of a rule or regulation of the commission." Indiana Code 7.1-2-3-22
6. All rights of any kind in an alcoholic beverage.....or in a container for an alcoholic beverage, or in an article, apparatus, package, fixture or utensil in which an alcoholic beverage.....may be placed, or which is used in connection with it.....shall at all times and under all circumstances by whomsoever held, owned, or possessed, be deemed qualified by the right of the state, the commission, and the chairman, to administer, execute, and enforce the provisions of this title. Indiana Code 7.1-2-5-5
7. A person shall have no property right of any kind in alcohol, an alcoholic beverage, a malt article....had, kept, transported, or possessed contrary to law,....or in a receptacle or container, which does not conform to, or which is being used contrary to, or which is not kept in conformity to a rule or regulation of the commission....or which is being used in an unlawful practice, or a practice contrary to a rule or regulation of the commission. Indiana Code 7.1-2-5-6
8. It is unlawful for the holder of a beer dealer's permit to offer or display for sale, or sell, barter, exchange or give away a bottle, can, container, or package of beer that was iced or cooled by the permittee before or at the time of the sale, exchange, or gift. Indiana Code 7.1-5-10-11
9. The standard to be applied by the Commission in permit violation proceedings is: The findings must be based upon the kind of evidenced that is substantial and reliable. To that end, the hearing judge's experience, technical competence, and specialized knowledge may be used in evaluating evidence. 905 IAC 1-37-11; 905 IAC 1-37-12; Indiana Code 4-21.5-3-27 & 29
10. The weight of the evidence and the burden of proof establishes that Speedway SuperAmerica LLC, d/b/a Speedway #6636, by virtue of its relationship with Stephen C. Smith, manager, is guilty of the violation of the unlawful display for sale of cooled beer. Indiana Code 7.1-5-10-11; Indiana Code 4-21.5-3-14; Indiana Code 4-21.5-3-27; Indiana Code 4-21.5-3-29; 905 IAC 1-37-11; 905 IAC 1-37-12
11. The weight of the evidence and burden of proof do not sustain any defense offered to the unlawful display for sale of cooled beer. Indiana Code 7.1-5-10-11; Indiana Code 4-21.5-3-14; Indiana Code 4-21.5-3-27; Indiana Code 4-21.5-3-29; 905 IAC 1-37-11; 905 IAC 1-37-12
12. Any conclusion of law may be considered a finding of fact if the context so warrants.

WHEREFORE, the Hearing Judge determines from the presentation and review of the evidence that the Prosecution HAS PROVEN that the Speedway SuperAmerica LLC, d/b/a Speedway # 6636, has violated the following statute:

Unlawfully displaying for sale cooled beer in violation of Indiana Code 7.1-5-10-11

WHEREFORE, the Hearing Judge recommends the following disposition to the Commission:

1. That the permittee be, and is **HEREBY ORDERED**, to cease and refrain from any further such displays and /or sales of beer in violation of Indiana Code 7.1-5-10-11; and,
2. A fine in the amount of one hundred fifty (\$150.00) dollars.

Date _____

E. Edward Dunsmore, Hearing Judge